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LOSS PREVENTION BULLETIN

ISSUE NO. 51 SPRING 2011

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■ Bulletin # 200

Best Practices: Engagement Letters

Consistent use of client engagement letters is a topic that we've addressed before [see: *The Rules of Non-Engagement*, Bulletin #159, Issue 38 (Fall 2006) and *Retainer Letters and Conflicts of Interest*, Bulletin #173, Issue 42 (Winter 2008)], but the message bears repeating.

In the January 2011 Canadian Bar Association webinar, Protecting Your Client, Yourself and Your Firm: When and How to Use an Engagement Letter, presented by the Task Force on Conflicts of Interest, a comment was made by one of the presenters that engagement letters are rarely found in files where allegations of professional negligence have been made. While it is likely impossible to prove any causal link between a lawyer's failure to use an engagement letter and the client's subsequent malpractice claim the use of such letters is nonetheless a reliable loss prevention practice.

One of the reasons posited by the webinar presenters for the reluctance of lawyers to use engagement letters is the perception that requiring a client to review and possibly sign such a letter places an unnecessary hurdle before the client. But is this really the case? The average consumer is accustomed to entering into service contracts with those they do business with, whether in arranging for painting a house, repairing a car or having a tax return prepared. Vendor contracts are the norm in many commercial transactions and typically do not prevent consumers from seeking those services. Perhaps the perception that clients may hesitate to use the services of a lawyer who sets out the terms of service in writing is misplaced and may rather reflect a lawyer's own reluctance to review the issue of fees with a client.

The use of an engagement letter is important for the following reasons:

1. The days of a client's lifelong loyalty to a single law firm are passing (if not already passed.) Clients today rarely rely on a single law firm for every purpose, choosing instead to select their lawyer based on any of a number of factors, from price to location to convenience. If you're not providing complete legal services to an individual or business, then you need to be very clear with that client about which services you are providing.
2. The trend to unbundling is related to the reduction in client loyalty to a single firm, but goes even further. Unbundled legal services refer to services provided to clients in a kind of "pick and choose" menu format, where, for example, legal advice may be given on a single question but not on an entire transaction. Unbundling your legal services necessitates setting out the parameters of your retainer as precisely as possible and in writing.
3. The complexity of the law relating to conflicts of interest has made use of conflicts as a litigation tactic even more common. Addressing these issues through your engagement letter reduces the likelihood that a conflict will be discovered mid-stream.
4. A well-drafted engagement letter, setting out your responsibilities and obligations to your client, is a good communication tool that may avert those professional liability or disciplinary claims that often arise when the lawyer/client relationship is misunderstood by the client or goes sour.

Is it necessary to write an engagement letter on every file you open? Ideally, yes; but, more practically, consider at least using an engagement letter at the outset of each new client relationship.

The contents of your engagement letter can be standardized to a point. Typically, an engagement letter will address the following 5 key questions:

1. What services will be performed?Depending on the details of your retainer, you may need to specifically and carefully outline the scope of the work you'll undertake. It may be even more important to outline which services will not be provided. The letter should also address the process for termination of your retainer.
2. Who is the client? This may appear obvious, but in some cases it is difficult to determine to whom exactly the lawyer-client obligations attach. When addressing this point, you should also clarify who is able to instruct counsel.
3. What will you charge for the services and how will it be charged? Clients have budgets and financial constraints, and therefore need to know how fees are calculated and billed

out. Being clear about fees and disbursements at the outset of the relationship is also a self-protective measure that may help you to avoid fee disputes or problems with collection. If a fee estimate is provided, outline the assumptions upon which the estimate was based.

4. How will your obligation of confidentiality be addressed? Take this opportunity to clarify to your client in plain language just what the obligation to keep their information confidential means and how your firm will protect their information.
5. How will conflicts be addressed if they arise? Engage your clients in the conflicts avoidance process. Let them know that you won't act where there is a conflicting interest, and what you will do if you discover a conflict mid-way through the case. You may wish to also set out the specifics of the conflicts search you conducted so as to confirm the steps taken at the outset.

There are of course numerous other issues that may be addressed in the engagement letter. For example:

- joint retainers
- limited purpose/mandate retainer
- security of electronic information

You can find more information on all these issues on the Task Force website, including model engagement (and non-engagement) letters at: http://www.cba.org/CBA/groups/conflicts/toolkit2.aspx. The site includes a number of well-thought out and useful precedents that you can easily download and modify to your specific purposes.

Given the availability of these excellent resources, there really is no excuse for failing to implement use of engagement letters in your day-to-day practice.

■ Bulletin # 201

Friend or Foe? Social Media and Lawyers

LinkedIn, Facebook, Twitter. These are the communication tools of the 21st century, but to what extent are lawyers using these socially-focused media, and for what purpose? According to the American Bar Association's 2010 *Legal Technology Survey Report*, some 56 percent of American lawyers in private practice have a presence in an online social network. This is up from 43 percent noted in their 2009 survey and 15 percent in 2008. The numbers are likely quite similar for Canadian lawyers.

While the marketing benefits of being visible online are easy to imagine, there are reasons why lawyers need to proceed with caution in making their mark on the web, whether as a blogger, friend, connection, follower or even just making a comment on another person's post.

The issue was recently raised in the ABA Journal article, *Seduced: For Lawyers the Appeal of SocialMedia is Obvious. It's Also Dangerous* (published February 1, 2011 online at: http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/). The author outlined a number of areas in which lawyers may potentially run into trouble with their governing bodies, as a result of their use of social media:

- Communications with a person represented by counsel. For example, while posting to a blog that another lawyer's client may read is likely not a concern, seeking to "connect" or "friend" a client of another lawyer may be prohibited communication.
- Breach of integrity. In the course of an investigation to further litigation, seeking access to someone's locked account by subterfuge, pretending to be someone or having someone else make the friend request so as to access the Facebook account of an opposing party or of a witness raises issues of dishonesty that may attract the attention of your law society.
- Compliance with advertising rules. Recommendations given on your LinkedIn profile may provide false or misleading information, or breach rules regarding holding yourself out as an expert. Similarly, the online profile you create may ask you to note your areas of expertise, possibly in violation of your local advertising rules.

There are other social media traps that lawyers also need to remain alert to. For example, in writing blog posts or providing answers to questions posed on forums, there are conflicts and liability issues to consider if the legal information you provide strays over the line into provision of legal advice.

Another issue that may arise relates to the duty to keep client information confidential. While it should go without saying that lawyers should not "tweet" or otherwise post any confidential client information, it is less obvious that using a geographical location-based feature when posting to Facebook or Twitter may result in inadvertently releasing such information. Care must therefore be taken when using such features, especially when meeting with clients on their premises or at any location other than your own office.

There is no reason for lawyers to shy away altogether from use of social media, whether as a means to connect with colleagues and clients or as a marketing tool. It is however necessary to always use "due diligence" in online communications and remain alert to the potential traps associated with the use of such tools.